

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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In re:

X-TREME BULLETS, INC.,

Debtor.

HOWELL MUNITIONS & TECHNOLOGY,
INC., AMMO LOAD WORLDWIDE, INC.,
CLEARWATER BULLET, INC., HOWELL
MACHINE, INC., FREEDOM
MUNITIONS, LLC, LEWIS-CLARK
AMMUNITION COMPONENTS, LLC, and
COMPONENTS EXCHANGE, LLC,

Jointly Administrated Debtors.

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
ALCOHOL AND TOBACCO TAX AND
TRADE BUREAU,

Appellant,

v.

X-TREME BULLETS, INC., AMMO LOAD
WORLDWIDE, INC., CLEARWATER
BULLET, INC., FREEDOM MUNITIONS,
LLC, HOWELL MACHINE, INC.,
HOWELL MUNITIONS & TECHNOLOGY,
INC., LEWIS-CLARK AMMUNITION
COMPONENTS, LLC, COMPONENTS
EXCHANGE, LLC, KASH CA, INC.;
DAVID HOWELL, Z.B. N.A. dba ZIONS
FIRST NATIONAL BANK, CFO
SOLUTIONS, LLC dba ADVANCED CFO,
Matthew McKinlay and Valerie Grindle,

Appellees.

Case No. 3:19-cv-00637-MMD

Member Cases:

3:19-cv-666-MMD, 3:19-cv-667-MMD,
and 3:20-cv-00117- MMD

Jointly Administered Under Bankruptcy.
Case No. 18-50609-BTB (Lead Case)

Chapter 11

ORDER

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I. SUMMARY

This is a consolidated appeal from the United States Bankruptcy Court for the District of Nevada (“Bankruptcy Court”) from jointly administered Chapter 11 bankruptcy proceedings. This order concerns the first three of four appeals (“the Appeals”) by Appellant the United States of America, on behalf of the Department of the Treasury Alcohol and Tobacco Tax and Trade Bureau (“TTB”), challenging multiple orders the Bankruptcy Court issued. (ECF No. 32.) Debtors and debtors-in-possession—X-Treme Bullets, Inc., Ammo Load Worldwide, Inc., Clearwater Bullet, Inc., Freedom Munitions, LLC, Howell Machine, Inc., Howell Munitions & Technology, Inc. (“HMT”), Lewis-Clark Ammunition and Components, LLC and Components Exchange, LLC (collectively, “Debtors-Appellees”)—have moved to dismiss the Appeals (“MTD”).¹ (ECF No. 22.) They specifically challenge TTB’s standing to bring the Appeals and make claims of mootness. For the reasons stated below, the Court agrees that the Appeals should be dismissed on mootness grounds.

II. BACKGROUND

The following facts are not in dispute and are based on the records before the Court.

Debtors-Appellees filed Chapter 11 petitions for relief in the Bankruptcy Court on June 8, 2018. (ECF No. 24-2 at 2.) Their Chapter 11 bankruptcies were jointly administered under Bankruptcy Case No. 3:18-bk-50609-BTB. (*Id.*) Appellees include Zions Bancorporation, N.A. dba Zions First National Bank (“Zions”), who was Debtors-Appellees’ primary pre-petition secured creditor. (ECF No. 62-2 at 7, 27–28.)

On July 19, 2018, Zions filed a proof of claim (“POC”) against all Debtors-Appellees for approximately \$17,529,219 (“Secured Claim”). (*Id.*; *see also id.* at 434–35 (explaining the Secured Claim); ECF No. 33-5 at 185.) Appellee Kash CA, Inc. (“Kash”) acquired from

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¹In addition to the MTD, the Court has considered the related response (ECF No. 26), reply (ECF No. 29), addendum (ECF No. 36), and joinders (ECF Nos. 25, 31, 35, 42). The Court has also reviewed the associated substantive appellate briefing. (ECF Nos. 32 (opening brief), 43 (answering brief), 45 (joinder), 49 (joinder), 50 (reply brief).)

1 Zions Zions' Secured Claim, and the liens encumbering the assets of Debtors-Appellees,
2 and non-debtor affiliates of the Debtors-Appellees, Twin River Contract Loading, Inc.
3 ("Twin River") and Big Canyon Environmental, LLC ("Big Canyon"), by paying Zions \$8.8
4 million cash in September 2019. (ECF No. 62-2 at 25, 30–31 (declaration of Angela Smith,
5 Debtors-Appellees' Chief Financial Officer).) This agreement between Zion and Kash is
6 called the Kash Loan Purchase Agreement. (*Id.*) A separate agreement—the Kash Asset
7 Purchase Agreement (ECF No. 24-1), ultimately resulted in Kash's purchase of the assets
8 from Debtors-Appellees.

9 David C. Howell ("Howell") is the principal of each of the Debtors-Appellees. (ECF
10 No. 62-2 at 5, 26.)² Howell and the President of Kash, Daniel Kash, had been close
11 acquaintances and friends for several years in the ammunitions business. (ECF No. 33-7
12 at 19 (declaration of Daniel Kash).) However, according to Kash, Howell had no interest
13 in Kash's business although he was initially listed as Kash's designated registered agent
14 in Idaho. (*Id.* at 19–20.)

15 Solely in HMT's bankruptcy case, TTB has asserted its security interest based on
16 a federal tax lien ("Lien") assessed against non-debtor Twin River. (*E.g.*, ECF No. 33-3 at
17 125; ECF No. 62-1 at 461–72; *see also* ECF No. 33-3 at 178 (Debtors-Appellees' counsel
18 explaining that there is no dispute that TTB has a valid claim against Twin River).) The
19 Lien was filed in January 2017. (ECF No. 62-1 at 461–72.) It arose from Twin River's
20 failure to pay federal excise taxes, pursuant to 26 U.S.C. § 6201, for Twin River's
21 manufacture of ammunition. (See ECF No. 62-1 at 465, 468.) TTB ultimately filed a POC
22 in HMT's bankruptcy case to recover on the Lien ("TTB Claim"), and also contended, *inter*
23 *alia*, that the bankruptcy estate had consolidated therein assets of non-debtor Twin Rivers
24 to which the Lien attached. (*E.g.*, ECF No. 33-3 at 125–26; ECF No. 62-1 at 461–72.)

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26 ²The Debtors-Appellees' respective business operations included the manufacture
27 of bullets; the manufacture of ammoload machines and other machines; the fabrication of
28 parts that were used to build the ammoload machines; and the manufacture of shell cases
and the sale of ammunition. (*E.g.*, ECF No. 62-2 at 26–27.) While the entities are legally
separate, they have at all times operated on a consolidated basis. (ECF No. 33-3 at 51.)

TTB's contentions in the Bankruptcy Court were unavailing, resulting in TTB filing four appeals from four separate orders that court issued—Case Nos. 3:19-cv-00637-MMD, 3:19-cv-00666-MMD, 3:19-cv-00667-MMD, 3:20-cv-00117-MMD—concerning the proceedings and related transactions. All four appeals have been consolidated under the lead case number, Case No. 3:19-cv-00637-MMD.³ TTB separately appealed the Bankruptcy Court's order disallowing the TTB Claim ("Disallowance Order")—fourth appeal. (ECF Nos. 61, 66, 69.) This Court has ruled on that appeal, finding the Bankruptcy Court abused its discretion in failing to make sufficient findings in disallowing the TTB Claim. (ECF No. 76.)

A. First Appeal—Case No. 3:19-cv-00637-MMD

TTB challenges the Bankruptcy Court's decision to grant Debtors-Appellees' motion requesting that the Bankruptcy Court approve three settlement agreements ("Compromise Motion"). (See 3:19-cv-00637 (ECF No. 1-4).) The settlement agreements are: the Zions Settlement Agreement (ECF No. 33-3 at 5–18); the Kash Settlement Agreement (ECF No. 33-3 at 24–39); and the Howell Settlement Agreement. (See ECF No. 33-3 at 244–46 (Order granting the Compromise Motion ("Compromise Order")).) Details of these agreements are provided below.

TTB objected to the Compromise Motion in the Bankruptcy Court proceedings. (ECF No. 33-3 at 124–29.) Debtors-Appellees replied to TTB's opposition arguing in gist that the opposition was meritless and that there was good cause to grant the relief requested in the Compromise Motion. (ECF No. 33-3 at 149–62.) A hearing was held concerning the Compromise Motion on August 18, 2019. (*Id.* at 168–211.) After the parties' arguments at the hearing,⁴ the Bankruptcy Court decided to grant the Compromise Motion.

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³All citations to the docket are from the lead case number.

⁴At the hearing, counsel for Debtors-Appellees specifically noted that they were not then seeking to resolve the disputed TTB Claim. (ECF No. 33-3 at 172.) Rather, they noted that only a limited issue was before the Court. (*Id.*) They were only seeking authorization for "debtors to enter into and to perform their obligations under the three settlement agreements." (*Id.*) This would include:

(*Id.* at 206–07.) The Bankruptcy Court specifically stated “I’m granting the relief requested in your motion” while expressing uncertainty as to what a drafted order would look like in light of what was contended at the hearing. (*Id.*) Debtors-Appellees’ counsel responded that he had an order ready but would make slight modifications to state that “the Zions claim is the first priority, duly perfected, unavoidable” to remediate concerns expressed by Kash’s counsel on the issue of priority. (*Id.* at 207.) The Bankruptcy Court responded: “Okay. So go ahead and make those modifications.” (*Id.*) The Compromise Order the Court later entered approved the Zions Settlement Agreement, the Kash Settlement Agreement and the Howell Settlement Agreement. (*E.g., id.* at 245–46.)

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some matters that are the subject of dispute with the TTB, and specifically, the debtors request that this Court enter an order authorizing the debtors to affirm that Zions Bank has a first priority security interest encumbering the debtors’ assets and that the debtors affirm that the buyer will have the right, assuming that the buyer in fact closes on its acquisition of Zions secured claims, the buyer will have the right to credit bid under Section 363(k) of the Bankruptcy Code up to the full amount of the Zions secured claim that it will acquire.

(*Id.*) Yet counsel for Debtors-Appellees provided lengthy contentions as to why the TTB Claim was, among other things, frivolous and its underlying lien not senior to Zions’ lien and asking the Bankruptcy Court to make the latter finding. (*Id.* at 177–84.) Counsel also consistently pulled back certain contentions as not then being before the Bankruptcy Court. (*Id.*) TTB’s counsel stated he was “puzzled” by Debtors-Appellees’ counsel’s arguments and noted he would not then address them because:

most of the argument that debtors’ counsel proposed today is not before the Court today. It appears to be in the nature of an objection to the Government’s claim which has not been filed, and all of these issues are raised in our reply brief that was filed yesterday. So with the Court’s permission, I’m not going to address those points.

(*Id.* at 194.) TTB counsel specifically noted that the issue of priority was “beyond the scope of today’s hearing.” (*Id.*) TTB’s counsel’s position at the hearing included that in spite of the settlements, non-parties to the settlements are not accordingly bound. (*Id.* at 195–97.) TTB counsel also noted that as of the hearing, the TTB Claim had not been objected to. (*Id.* at 198.) Zions’ counsel thereafter offered his position that the Bankruptcy Court could “absolutely” rule on the priority issue. (*Id.*) Debtors-Appellees’ counsel then noted that the issue had been fully briefed. (*Id.* at 200.) Finally, Kash’s counsel offered that it was key to the settlement agreements that, *inter alia*, there had to be “an *acknowledgment* as to the amount, the scope, the validity, perfection, and enforceability of the Zions first priority secured claims.” (*Id.* at 205 (emphasis added).)

1 The Zions Settlement Agreement was entered into by and among the Debtors-
2 Appellees and non-debtor affiliates of the Debtors-Appellees, Twin River and Big Canyon,
3 and Howell, on one hand, and Zions and CFO Solutions, LLC dba Advanced CFO,
4 Matthew McKinlay, Valerie Grindle and Sussman Shank LLP (“Advanced CFO Parties”),
5 on the other hand. (ECF No. 33-5 at 165–80; ECF No. 33-3 at 245.) The Zions Settlement
6 Agreement was the result of Zions requiring, *as a condition to* it entering into the Kash
7 Loan Purchase Agreement, that the Debtors-Appellees, Twin River, Big Canyon and
8 Howell settle and release their claims against Zions. (*E.g.*, ECF No. 33-3 at 187 (“That’s
9 an absolute condition of [Zions].”); ECF No. 33-5 at 208.)

10 The Kash Settlement Agreement (ECF No. 33-5 at 184–204) was entered into by
11 and among the Debtors-Appellees, Twin River, Big Canyon and Howell, on one hand, and
12 Kash, on the other hand. Kash required, *as a condition to* its entering into the Kash Loan
13 Purchase Agreement and the Kash Asset Purchase Agreement, that Debtors-Appellees,
14 Twin River, Big Canyon and Howell enter into this settlement agreement with it. (*Id.* at
15 185–86, 208.) Under this agreement, Debtors-Appellees, Twin River, Big Canyon and
16 Howell agreed to, among other things: (i) waive and release any and all claims that they
17 may have against Kash; and (ii) waive any and all defenses to the loans, the liens and the
18 loan documents related to Zions’ Secured Claim *and affirm* that, upon the effectuation of
19 the Kash Loan Purchase Agreement, Kash, as the assignee of Zions’ Secured Claim,
20 would hold a “valid, enforceable, non-avoidable, *perfected first-priority security interest in*
21 *all property* of the [Debtors-Appellees] constituting Zions’s collateral,” in accordance with
22 the terms and conditions of the Kash Settlement Agreement. (*Id.* at 186–88 (emphasis
23 added).) In addition, the Debtors-Appellees acknowledged that, upon Kash’s acquisition
24 of Zions’ Secured Claim, Kash would have the right, pursuant to section 363(k) of the
25 Bankruptcy Code, to make a credit bid up to the full amount of the Secured Claim, to
26 acquire substantially all of the assets and properties of the Debtors-Appellees pursuant to
27 the Kash Asset Purchase Agreement. (*Id.* at 190–91.)

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1 The Howell Settlement Agreement (ECF No. 33-5 at 205–23) was entered into by
 2 and among the Debtors-Appellees and Twin River, on one hand, and Howell and certain
 3 relatives and other affiliates of Howell (“Howell Parties”), on the other hand. (*Id.* at 191,
 4 206.) Howell required, *as a condition to* his entering into the Zions Settlement Agreement
 5 and the Kash Settlement Agreement and his giving the releases provided for thereby, that
 6 the Debtors-Appellees waive and release claims against the Howell Parties. (*Id.* at 208–
 7 09.)

8 **B. Second Appeal—Case No. 3:19-cv-00666-MMD**

9 This appeal involves the Bankruptcy Court’s order approving the sales procedures
 10 for the sale of Debtors-Appellees’ property (“Sales Procedures Order”). The underlying
 11 Sales Procedures Memorandum (ECF No. 33-5 at 250–60) proposed to sell substantially
 12 all of the assets and properties of Debtors-Appellees, including without limitation, Debtors-
 13 Appellees’ furniture, fixtures, equipment, inventory, intellectual property rights, and
 14 accounts receivable associated with the operation of their businesses (collectively, the
 15 “Marketed Assets”). (*E.g., id.* at 250.) The Sales Procedure Memorandum also noted that
 16 Debtors-Appellees had retained J. Michael Issa of GlassRatner Advisory & Capital Group,
 17 LLC to assist them as their Chief Restructuring Officer (“CRO”) in connection with
 18 supervising the operations of Debtors-Appellees’ businesses and administering Debtors-
 19 Appellees’ bankruptcy cases. (*Id.*) Issa would be responsible for:

20 supervising the marketing of the Marketed Assets; interfacing with
 21 prospective bidders regarding qualification of bidders with respect to their
 22 participation in the Auction and performance of diligence investigations with
 23 respect to a purchase of the Marketed Assets; and for conducting the
 Auction. [He would also] supervise the sale process, the evaluation of any
 bids made for the Marketed Assets and the selection of the “Successful
 Bidder”

24 (*Id.*) The Sales Procedure Memorandum further provided, among other things, that Kash
 25 was to be the “Stalking Horse Bidder.” (*Id.*) This meant that Debtors-Appellees had
 26 accepted Kash’s offer to purchase the Marketed Assets “subject to: (i) higher and/or better
 27 offers; and (ii) the approval of the Bankruptcy Court.” (*Id.*) The Sales Procedure
 28 Memorandum provided that a sale would be by auction but also noted that Debtors-

Appellees intended to file a motion asking the Bankruptcy Court to assign and sell to the Stalking Horse Bidder—Kash—the Marketed Assets subject to “any overbids.” (*Id.* at 250–51, 256.) A hearing was held at which TTB argued its objections to the Sales Procedure Memorandum. (ECF No. 33-4 at 407–36.) After that hearing the Bankruptcy Court entered the Sales Procedures Order. (ECF No. 33-5 at 415–19.) That order approved the Sales Procedures Memorandum and the sales and bidding procedures set forth therein as governing “the proceedings for the sale of substantially all of the assets and properties of the Debtors, including without limitation, any Auction that may be conducted in the Debtors’ cases.” (*Id.* at 417.)

C. Third Appeal—Case No. 3:19-cv-00667-MMD

In this challenged order, the Bankruptcy Court granted Debtors-Appellees’ Motion for Order Authorizing: (1) Sale of Substantially all of the Assets of the Debtors Free and Clear of Liens and Interests in Accordance with the Provisions of Asset Purchase Agreement; (2) Assumption and Assignment of Unexpired Leases and Executory Contracts; and (3) Rejection of Unexpired Leases and Executory Contracts and Abandonment of Property (“Sale Motion”). (See ECF No. 24-8 at 1–17.) A hearing was held on the Sale Motion on October 16, 2019. (ECF No. 33-7 at 184–290 (transcript).) At that hearing, TTB contested, among other things, Kash being determined a good faith purchaser, putting on a witness to contend otherwise. (*Id.* at 202, 217, 223–83 (examination of TTB’s Witness Thomas Schmidt).) In the end the Bankruptcy Court decided to “allow the sale and overrule the objection of the United -- of TTB.” (*Id.* at 287.) In doing so, the court recognized that: “The TTB is afraid that taxes won’t be paid going forward after the sale . . . but I think the reasons stated by the movant who wants to – who wants the sale, by the preponderance of the evidence outweighed the objections of the TTB.” (*Id.* at 287–88.)⁵ The order granting the Sale Motion (“Sale Order”) found, *inter alia*:

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⁵Relatedly, Kash’s counsel shortly before noted that Kash was “very mindful going forward that it has tax obligations that it will comply with when it steps into the shoes of the debtors” (ECF No. 33-7 at 287.)

1 G. . . . The Debtors' entering into and consummating the Kash Asset
 2 Purchase Agreement is a sound exercise of the Debtors' business judgment.
 The Sale Transaction contemplated by the Kash Asset Purchase Agreement
 is in the best interests of the Debtors' creditors and estates.

3
 4 H. Pursuant to the Court's Compromise Motion Order the Court has
 authorized Kash CA to make a credit bid to acquire the Purchased Assets
 up to the full amount of the Zions Secured Claim acquired by Kash CA from
 5 Zions. . . .

6 I. Good cause exists to authorize the Debtors to sell the Purchased Assets
 free and clear of all Liens of any kind or nature because the requirements
 set forth in section 363(f) of the Bankruptcy Code, including section
 363(f)(4), have been satisfied.

7
 8 J. The Kash Asset Purchase Agreement was negotiated, proposed and
 entered into by and among the Debtors and Kash CA without collusion, in
 good faith, and from arm's-length bargaining positions . . . Accordingly, upon
 consummation of the Sale Transaction contemplated by the Kash Asset
 Purchase Agreement, Kash CA will be a buyer in "good faith" within the
 meaning of section 363(m) of the Bankruptcy Code . . .

12 . . .

13 N. By the Sale Motion, the Debtors request that the Court authorize the sale
 only of property of the Debtors' estates under section 541 of the Bankruptcy
 Code, and not any property of any non-debtor entity. The Purchased Assets
 to be sold and assigned to Kash CA pursuant to the Kash Asset Purchase
 Agreement have been adequately disclosed and identified.

16 . . .

17 Q. Good cause exists to approve the Purchaser's Subordination
 Agreement^[6] in connection with and in furtherance of the Sale Transaction.
 The Debtors have submitted legal authority and evidence adequate for the
 Court to approve the Purchaser's
 Subordination Agreement.

20 . . .

21 (ECF No. 24-8 at 1–17.)

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25 ⁶Kash entered into this agreement with Debtors-Appellees as an integral part of the
 later Sale Transaction whereby Kash agreed to pay the purchase price provided in the
 26 Kash Asset Purchase Agreement by a carve-out of the Secured Claim that Kash would
 acquire pursuant to the Kash Loan Purchase Agreement. (See ECF No. 24-2.) Under the
 27 carve out, instead of keeping all proceeds of the Sale Transaction, Kash agreed instead
 to carve-out a portion of the proceeds to be placed in trust for the benefit of designated
 28 unsecured creditors of Debtors-Appellees. (*E.g.*, *id.* at 3–5.)

1 The sale of the purchased assets occurred on October 22, 2019 (“Sale
2 Transaction”).⁷ (ECF No. 33-8 at 182.) TTB thereafter sought a stay of the Sale
3 Transaction, which the Bankruptcy Court denied with prejudice after a hearing held on
4 January 7, 2020. (ECF No. 30 at 11–12; ECF No. 36-1 at 2–3.) TTB did not appeal the
5 denial of the stay.

6 **III. LEGAL STANDARD⁸**

7 This Court has jurisdiction to hear timely appeals from a judgment, order, or decree
8 of the Bankruptcy Court under 28 U.S.C. § 158(a).

9 The Court reviews “the bankruptcy court’s conclusions of law *de novo* and its
10 findings of fact for clear error.” *In re Bonham*, 229 F.3d 750, 762 (9th Cir. 2000). The
11 Bankruptcy Court’s factual findings are clearly erroneous only if the findings “leave the
12 definite and firm conviction” that the Bankruptcy Court made a mistake. *In re Rains*, 428
13 F.3d 893, 900 (9th Cir. 2005). “A bankruptcy court abuses its discretion if it applies the law
14 incorrectly or if it rests its decision on a clearly erroneous finding of a material fact.” *In re*
15 *Brotby*, 303 B.R. 177, 184 (B.A.P. 9th Cir. 2003). A bankruptcy court also abuses its
16 discretion where “it applies the wrong legal standard, misapplies the correct legal
17 standard, or if its factual findings are illogical, implausible, or without support in inferences
18 that may be drawn from the facts in the record.” *In re Plyam*, 530 B.R. 456, 461 (B.A.P.
19 9th Cir. 2015).

20 Particularly material to the Appeals, a bankruptcy court’s decision on a motion to
21 sell pursuant to section 363(b) is reviewed for abuse of discretion. *See, e.g., Rosenberg*
22 *Real Estate Equity Fund III v. Air Beds, Inc. (In re Air Beds, Inc.)*, 92 B.R. 419, 422 (9th
23 Cir. BAP 1988) (citing *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel*
24 *Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) & *Big Shanty Land Corp. v. Comer Properties*,
25 *///*

26 ⁷TTB filed its third appeal on October 30, 2019. (ECF No. 1-2, Case No. 3:19-cv-
27 00667-MMD.)

28 ⁸To the extent the parties dispute the applicable standards of review (*e.g.*, ECF No.
32 at 5; ECF No. 43 at 14–17; ECF No. 50 at 6), the Court sets forth the applicable
standards and does not address the matter further.

1 *Inc.*, 61 B.R. 272, 277 (N.D. Ga. 1985)). A bankruptcy court's finding of good faith is
 2 primarily a factual determination which is reviewed for clear error. *E.g.*, *In re Taneja*, 743
 3 F.3d 423, 429 (4th Cir. 2014); *Meeks v. Red River Entm't (In re Armstrong)*, 285 F.3d
 4 1092, 1096 (8th Cir. 2002) (citations omitted).

5 The Court may affirm the bankruptcy court's decision "on any ground fairly
 6 supported by the record." *In re Warren*, 568 F.3d 1113, 1116 (9th Cir. 2009).

7 **IV. DISCUSSION**

8 In their MTD, Debtors-Appellees in gist argue: (1) the Appeals are statutorily moot
 9 under Title 11 of the United States Code section 363(m); and (2) the Appeals are equitably
 10 moot. (See *generally* ECF No. 22.) They later added a contention that TTB lacks standing
 11 to pursue the Appeals in their reply brief. (*E.g.*, ECF No. 29 at 2, 4–5.)⁹ The Court will
 12 briefly *sua sponte* consider the standing issue. Further, because the Court agrees that the
 13 Appeals are moot under section 363(m), the Court does not consider equitable mootness
 14 and the merits of the parties' substantive contentions beyond the issue of Kash's status
 15 as a good faith purchaser.

16 **A. Standing**

17 "[W]hether or not the parties raise the issue, '[f]ederal courts
 18 are *required* sua sponte to examine jurisdictional issues such as standing.'" *D'Lil v. Best*
 19 *W. Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th Cir. 2008) (alteration in original)
 20 (citations and some internal quotation marks omitted). But it is not definitive that TTB lack
 21 standing to pursue the Appeals.

22 Debtors-Appellees base their contention of a lack of standing on the ground that
 23 the Bankruptcy Court disallowed the TTB Claim. (*E.g.*, ECF No. 29 at 2, 4–5.) As noted,
 24 this Court has issued an order vacating and remanding the Disallowance Order for
 25 insufficient findings. This may suggest that TTB may still have a pecuniary interest for
 26 ///

27 ⁹The standing argument was apparently added to Debtors-Appellees' reply brief
 28 after the Dismissal Order was issued. (*E.g.*, ECF No. 29 at 2.) It was also raised in their
 answering brief concerning the Appeals (ECF No. 43 at 18) and therefore TTB had an
 opportunity to address the issue but did not (*see generally* ECF No. 50).

1 which it could obtain relief thereby precluding a finding of a lack of standing. *See, e.g., In*
 2 *re 240 N. Brand Partners, Ltd.*, 200 B.R. 653 (B.A.P. 9th Cir. 1996) (“In order to have
 3 standing to appeal, a party must be “directly and adversely affected pecuniarily” by the
 4 bankruptcy court decision.”) (citations omitted). But it appears to the Court that at best
 5 there is a bona fide dispute as to the Debtors-Appellees’ liability to TTB and caselaw
 6 supports that standing is lacking under such circumstances. *See, e.g., Dep’t of Revenue*
 7 *v. Blixseth*, 942 F.3d 1179, 1187 (9th Cir. 2019) (concluding that standing is lacking to the
 8 extent a claim is subject to a bona fide dispute on the petition date); *see also In re Dexter*
 9 *Distrib. Corp.*, No. BAP AZ-09-1386MKKIJU, 2010 WL 6466583, at *5 n.15 (B.A.P. 9th
 10 Cir. Oct. 21, 2010) (“Of course, if [appellant’s] claim were disallowed in its entirety, he
 11 would no longer be ‘affected pecuniarily’ by the bankruptcy court’s fee award to [the
 12 appellee] and thus would lack standing to appeal the fee award.”). In light of the lack of
 13 clarity as to standing, the Court will address mootness.

14 **B. Statutory Mootness**

15 Even if TTB has standing, the Court concludes that the Appeals are statutorily moot.
 16 Here, Debtors-Appellees specifically argue that the Appeals are statutorily moot under
 17 section 363(m) because TTB indisputably failed to obtain a stay of the Sale Order, the
 18 Sale Transaction has been closed and fully consummated and the relief granted in the
 19 other orders—Compromise Order and Sales Procedures Order—were all *integral* to the
 20 Sale Transaction. (ECF No. 22 at 16–33.)¹⁰ Even considering the narrowed view of
 21 mootness under recent Ninth Circuit caselaw, the Appeals are moot under section 363(m).

22 The section protects the rights of a good faith purchaser on appeal, providing that

23 [t]he reversal or modification on appeal of an authorization under subsection
 24 (b) ... of a sale or lease of property does *not* affect the validity of a sale or
 25 lease under such authorization to an entity that purchased or leased such
 property *in good faith*, whether or not such entity knew of the pendency of
 the appeal, *unless such ... sale or lease were stayed pending appeal*.

26 ///

27 _____
 28 ¹⁰“The party moving for dismissal on mootness grounds bears a heavy burden.”
Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d
 869, 880 (9th Cir. 2012) (internal quotation and citation omitted).

11 U.S.C. § 363(m) (emphasis added). Debtors-Appellees essentially argue that the Appeals are per se moot under section 363(m) for the lack of a stay. This position appears to be supported by prior decisions in the majority of circuits. See, e.g., *Mission Prod. Holdings, Inc. v. Old Cold, LLC* (*In re Old Cold, LLC*), 879 F.3d 376, 383 (1st Cir. 2018) (citation omitted) (explaining that section 363(m) has been interpreted “to render statutorily moot *any* appellate challenge to a sale that is both to a good faith purchaser, and not stayed”) (emphasis added); *In re Parker*, 499 F.3d 616, 621 (6th Cir. 2007) (“A majority of our sister circuits construe § 363(m) as creating a *per se* rule automatically mooting appeals for failure to obtain a stay of the sale at issue.”) (collecting cases).¹¹

Recently, the Sixth Circuit has expressly sided with the Third and Tenth Circuits in opting to follow the narrower alternative view of mootness under section 363(m). See *In re Brown* (“*Brown*”), 851 F.3d 619, 623 (6th Cir. 2017).¹² Under this alternative view, parties alleging statutory mootness under section 363(m) must “prove that the reviewing court is unable to grant effective relief without affecting the validity of the sale.” *Id.*; see also *In re ICL Holding Co., Inc.*, 802 F.3d 547, 554 (3d Cir. 2015) (finding, despite failure to obtain a stay, section 363 did not moot the government’s appeal concerning the distribution of substantially all of the debtor’s proceeds because the court could order redistribution of the sale proceeds without disturbing the sale); *C.O.P. Coal Dev. Co. v. C.W. Mining Co.* (*In re C.W. Mining Co.*), 641 F.3d 1235, 1239 (10th Cir. 2011) (finding no mootness albeit failure to obtain a stay where state law provided for equitable relief in the form of a constructive trust on the proceeds of the conveyance at issue); see also *In re Trism, Inc.*, 328 F.3d 1003, 1006–07 (8th Cir. 2003) (“The language of section 363(m) ///

¹¹See also *In re Vance*, 12 F. App’x 380, 382 (7th Cir. 2001) (citations omitted) (“Whether or not the sale was proper is irrelevant; where the sale has been approved by the bankruptcy court under 11 U.S.C. § 363(b), a party must obtain a stay of the sale or else any appeal of the approval will become moot.”).

¹²In an even more recent decision the Seventh Circuit has gone as far as holding that “§ 363(m) does not make any dispute moot or prevent a bankruptcy court from deciding what shall be done with the proceeds of a sale or lease” and overturning its prior related decisions. *In Trinity 83 Dev., LLC v. ColFin Midwest Funding, LLC*, 917 F.3d 599 (7th Cir. 2019).

moots any challenge to an order approving the sale of assets that satisfies two requirements. First, no party obtained a stay of the sale pending appeal. Second, reversing or modifying the authorization to sell would affect the validity of the sale or lease.” (citations and marks omitted)). In *Brown*, the Sixth Circuit concluded that “[t]his is the superior interpretation of § 363(m) as it accommodates the provision’s clear preference in favor of upholding the validity of bankruptcy sales without unduly restricting the appellant’s right to contest errors of law made by the bankruptcy court.” 851 F.3d at 623.

At least one decision from this district has classified the alternative approach as the “validity of sale exception.” *In re USA Commercial Mortg. Co.*, No. 207CV-00072-RCJ-GWF, 2007 WL 2571947, at *6–*7 (D. Nev. Aug. 29, 2007). *In re USA Commercial Mortg. Co.* acknowledged that, at the time of that decision, the Ninth Circuit had recognized only two exceptions to section 363 mootness. *Id.* at *7–*9; see *Ewell v. Diebert (In re Ewell)*, 958 F.2d 276, 280 (9th Cir. 1992) (recognizing exception to mootness only where (1) the debtor has a statutory right of redemption, and (2) other state law would permit the sale to be set aside).

Indeed for its part, the Ninth Circuit has, in the past, consistently concluded that under section 363(m) failure to obtain a stay of sale of property to a good faith purchaser pending appeal renders an appeal of the order authorizing the sale moot without qualification beyond the two noted exceptions. See *In re Berkeley Delaware Court, LLC*, 834 F.3d 1036, 1040–41 (9th Cir. 2016) (“We have been reticent to carve out exceptions to the § 363(m) stay-of-sale requirement, and we again decline to do so now.”); *Paulman v. Gateway Venture Partners III (In re Filtercorp, Inc.)*, 163 F.3d 570, 576 (9th Cir. 1998) (providing that whether the appellate court “can fashion effective relief is immaterial,” where purchaser of business assets bought in good faith and a stay was not obtained); *Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.)*, 846 F.2d 1170, 1171–73 (9th Cir. 1988) (“Finality in bankruptcy has become the dominant rationale for our decisions; the trend is towards an absolute rule that requires appellants

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1 to obtain a stay before appealing a sale of assets.”); *see also In re Ewell*, 958 F.2d at 280;
 2 *Algeran, Inc. v. Advance Ross Corp., et. al.*, 759 F.2d 1421, 1423–24 (9th Cir. 1985).

3 However, in a more recent decision the Ninth Circuit appears to have shifted in
 4 alignment with the narrower view of section 363(m) mootness. *See In re Spanish Peaks*
 5 *Holdings II, LLC* (“*Spanish Peaks*”), 872 F.3d 892, 896 n.4 (9th Cir. 2017). In reaching the
 6 merits of the key issue in *Spanish Peaks*, the Ninth Circuit rejected the contention that the
 7 case was moot on the basis that the sale was approved and consummated. *Id.* The court’s
 8 expressed rationale for rejecting this argument was that “[b]y its terms, section 363(m)
 9 preserves *the validity* of a sale challenged on appeal.” *Id.* (emphasis in original). The Ninth
 10 Circuit concluded that the case was not moot under the section because the outcome of
 11 the appeal would not affect the sale’s validity. *Id.* It particularly noted that the appellants
 12 “have not asked us to undo the sale.” *Id.*

13 At first glance the *Spanish Peaks* decision would suggest that the Appeals are not
 14 moot because TTB may be deemed to assert that it does not seek to invalidate the sale
 15 to Kash. (See, e.g., ECF No. 26 at 3 (“The United States does not seek to overturn the
 16 transfer of estate property to Kash CA . . . The purpose of the appeals is to preserve the
 17 United States’ rights under the tax lien, to prevent the transfer of non-estate property[, i.e.,
 18 the Lien], and to challenge the agreement between Debtors and Kash CA that no proceeds
 19 of sale may be used to pay any tax liabilities of any Debtor.”); *id.* at 12 (“In respect to the
 20 issues actually on appeal, the fact that Debtors’ assets have been transferred to Kash CA
 21 does not require that this Court “unscramble the eggs.” Specifically, the priority and extent
 22 of the United States’ tax lien has not been determined and remains a live issue. The
 23 proceeds of sale have not been distributed, so in that respect the consummation has not
 24 occurred. Finally, as noted above, the sale of non-estate property [, i.e., the Lien,] is not
 25 authorized by the Bankruptcy Code.”).) Debtors-Appellees counter, however, that TTB’s
 26 claim that it is not seeking to overturn the transfer of estate assets to Kash is “misleading
 27 and disingenuous.” (ECF No. 29 at 7.) Without assigning such strong words, the Court
 28 agrees with Debtors-Appellees.

1 The words TTB uses and the issues it raises are themselves telling. First, TTB's
 2 paramount contention is its claim that the bankruptcy estate included non-estate
 3 property—particularly Twin River's assets to which TTB claims the Lien attaches. (*E.g.*,
 4 ECF No. 26 at 11–12.)¹³ TTB explicitly argues that such property was included in the
 5 assets sold to Kash and that such purchase was therefore not authorized by the
 6 Bankruptcy Code. (*Id.* at 12.) A verbatim recitation of the issues TTB raises in its opening
 7 brief on appeal also shows that TTB in fact challenges agreements and findings that were
 8 material to the culmination of the sale. The issues TTB presents are:

9 1. Whether the Bankruptcy Court erred and the United States' due process
 10 rights were violated, when the Bankruptcy Court impermissibly determined,
 11 first in an order approving compromises under Rule 9019, without an
 12 adversary proceeding or factual discovery, the relative priority and extent of
 the United States' lien against Debtors' and non-debtors' property, and by
 later reaffirming this order in its orders approving the sale procedures and
 sale.

13 2. Whether the Bankruptcy Court erred in approving Debtors/Sellers'
 14 proposed sales procedures, and by eventually approving the sale, without

15 ¹³The Court is not certain about the current interplay between a contention that non-
 16 estate property was included in the bankruptcy estate and the issue of mootness under
 17 section 363(m). In *In re Rodeo Canon Dev. Corp.*, the Ninth Circuit concluded, outside of
 18 the context of section 363(m) and the issue of a failure to obtain a stay, that a bankruptcy
 19 court erred by allowing the sale of property free and clear where it did not adjudicate the
 equitable ownership of the property until after sale of the property. 362 F.3d 603, 608–09
 (9th Cir. 2004), *opinion withdrawn and superseded*, 126 F. App'x 353 (9th Cir. 2005), as
 amended on denial of reh'g (Apr. 1, 2005). The decision was withdrawn after the
 ownership issue was resolved. *Id.* One case by a Ninth Circuit Bankruptcy Appellate Panel
 20 does consider *Rodeo* within the context of mootness and concludes that the bankruptcy
 court could not allow a sale to proceed without first determining the ownership interest.
 See *In re Popp*, 323 B.R. 260, 266 (B.A.P. 9th Cir. 2005). But this case and another case
 21 it relies on—*In re Focus Media, Inc.*, 378 F.3d 916 (9th Cir. 2004), see *id.* at 271—appear
 to be effectively overruled by *Blixseth* on standing grounds to the extent a property interest
 22 had not been determined by the petition date based on subsequent amendment of section
 363(b)(1). See 942 F.3d at 1184–86 & n.5. Further, BAP cases are not binding. See,
 23 *e.g.*, *In re Fitness Holdings Int'l, Inc.*, 714 F.3d 1141, 1144 n.3 (9th Cir. 2013) (citing *Bank*
of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) (“As article III courts,
 24 the district courts must always be free to decline to follow BAP decisions and to formulate
 their own rules within their jurisdiction.”))

25 Moreover, considering the argument as to the inclusion of “non-estate” property
 26 seems logically antithetical to a mootness doctrine because the issue clearly questions
 the entire propriety of the bankruptcy proceedings and goes into the merits of the
 27 case. Cf. *Weingarten Nostat, Inc. v. Serv. Merch. Co., Inc.*, 396 F.3d 737, 744 (6th Cir.
 2005) (“To accept [the defendant's] argument would rob § 363(m) mootness of its force,
 28 since an appeal of a bankruptcy court order will typically question whether a given
 transaction is authorized by the bankruptcy code.”).

1 requiring Debtors/Sellers to disclose with specificity what assets were being
 2 sold and demonstrate whether they were indeed the owners of such assets,
 3 when the United States contended that Debtors/Sellers had commingled
 4 their assets with those of non-debtor Twin River and that, even without
 proper disclosure, it appeared that Debtors/Sellers were seeking to sell non-
 estate property, and by denying the United States the opportunity to seek
 discovery on these issues.

5 3. Whether the Bankruptcy Court erred in approving sales procedures, and
 6 the eventual sale, that incorporated an asset purchase agreement that
 7 references an undisclosed subordination agreement between Debtors and
 the purchaser that appears to direct the proceeds of sale to creditors in ways
 8 that are contrary to Title 11 priorities and excludes payment of any taxes of
 any Debtor entity from the sales proceeds.

9 4. Whether the Bankruptcy Court erred and prevented a fair and competitive
 10 auction by its order approving compromises by allowing the purchaser of the
 11 Zions Bank claim to credit bid the full amount of the claim, where that relief
 12 was not requested in the motion to approve compromise and was based
 13 solely on the agreement of parties to the compromise, and by not requiring
 sufficient disclosure regarding this purchaser/stalking horse bidder and its
 connections to Debtors, David Howell, and associated entities in its order
 approving sale procedures, and by denying the United States the opportunity
 to seek discovery on the issue of whether Kash CA is a good faith purchaser
 under 11 U.S.C. § 363(m).

14 (ECF No. 32 at 4–5.)

15 These issues show that TTB's appeal in its essence would undermine the sale,
 16 even if the Court were to try to separate out the issue of whether TTB's Lien takes priority
 17 over other liens or continues to attach to the bankruptcy estate. Subsumed in this
 18 determination is also the Court's conclusion, as Debtors-Appellees argue, that all three
 19 orders constituting the Appeals were integral to the sale and its effectiveness. (*E.g.*, ECF
 20 No. 22 at 16–33; *see also* ECF No. 29 at 9–10 (contending that the issues TTB argues
 21 were all integral to the validity and effectiveness of the sale transaction); ECF No. 33-3 at
 22 205 (Kash's counsel, at the hearing on the Compromise Motion, offering that it was key to
 23 the settlement agreements that, *inter alia*, there was "an *acknowledgment* as to the
 24 amount, the scope, the validity, perfection, and enforceability of the Zions first priority
 25 secured claims." (emphasis added)); ECF No. 25-1 at 3–4 (Daniel Kash—President of
 26 Kash—declaring that "If the Bankruptcy Court had not approved the Kash Settlement
 27 Agreement acknowledging Zions' first priority security interest and not approve Kash CA's
 28 right to credit bid under Section 363(k) of the Bankruptcy Code as part of the Compromise

Order . . . Kash CA would not have agreed to proceed with the Kash Loan Purchase Agreement with Zions . . . and the Kash Asset Purchase Agreement would have been terminated”).)

Meaningfully, TTB does not expressly contest Debtors-Appellees’ claim of the integrality of the various orders appealed from, and caselaw supports that provisions integral to the sale of assets affect the sale’s validity. See, e.g., *In re Trism, Inc.*, 328 F.3d at 1007 (citations omitted) (“A provision is integral if the provision is so closely linked to the agreement governing the sale that modifying or reversing the provision would adversely alter the parties’ bargained-for exchange.”); see also *In re Stadium Mgmt. Corp.*, 895 F.2d 845, 849 (1st Cir. 1990) (finding sublease integral to a sale where “removing it from the sale would have adversely affected the terms of the sale”); but see *In re PW, LLC*, 391 B.R. 25, 35–36 (B.A.P. 9th Cir. 2008) (separating out the sale itself from the terms of the sale and concluding the former was protected under section 363(m) but the latter was not).¹⁴

In addition to these noted issues, *the relief* TTB seeks on appeal effectively goes back to ground zero which would necessarily serve to unravel the various agreements at the heart of the Sale Transaction. (See ECF No. 32 at 29 (asking the Court to reverse and remand the action back to the Bankruptcy Court for further development of the facts underlying the appealed issues, including for formal discovery).)

Accordingly, the Court concludes that section 363(m) bars consideration of the Appeals, unless TTB has been able to successfully challenge the Bankruptcy Court’s finding that Kash is a good faith purchaser. See *In re Rimoldi*, 172 F.3d 876 (9th Cir. 1999) (Table), 1999 WL 132260, at *1 n.2 (internal citation omitted) (“The mootness rule
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¹⁴But, as noted above, BAP decisions are not binding on the Court. Further, the Court agrees with, at least, one noted decision which has found *In re PW, LLC* unpersuasive. See *In re Gardens Req’l Hosp. & Med. Ctr., Inc.*, No. 2:16-BK-17463-ER, 2018 WL 1229989, at *5 (C.D. Cal. Jan. 19, 2018) (“A challenge to a material term of a sale, including that a sale is effectuated “free and clear” of others’ interests in the property, necessarily “affect[s] the validity of the sale.” Thus, property interests that are stripped by authorization pursuant to § 363(f) are subject to the protection set forth in § 363(m).”).

1 of section 363(m) applies only when a purchaser has bought an asset in good faith. Thus,
2 an appellant can challenge the good faith of the purchaser on appeal even if the appellant
3 did not obtain a stay of the sale.”). The Court now turns to that issue.

4 “The burden of proof to show good faith is on the proponent of good faith, usually
5 the party seeking dismissal of the appeal; it may not be assumed.” 3 COLLIER ON
6 BANKRUPTCY ¶ 363.11 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).
7 Relevantly, “neither the Bankruptcy Code nor the Bankruptcy Rules attempts to define
8 ‘good faith.’” *In re Alpha Indus., Inc.*, 84 B.R. 703 (Bankr. D. Mont. 1988). However, “courts
9 generally have followed traditional equitable principles in holding that a good faith
10 purchaser is one who buys ‘in good faith’ and ‘for value.’” *In re Ewell*, 958 F.2d at 281
11 (citation omitted). “Typically, lack of good faith is shown by ‘fraud, collusion between the
12 purchaser and other bidders or the [debtor in possession], or an attempt to take grossly
13 unfair advantage of other bidders.” *Id.* (quoting *In re Suchy*, 786 F.2d 900, 902 (9th Cir.
14 1985)).

15 TTB does not challenge the substance of the Bankruptcy Court’s finding that Kash
16 was a good faith purchaser (see ECF No. 24-8 at 7, 14). TTB only notes that it contested
17 the issue in the bankruptcy proceedings. (ECF No. 26 at 11; see also ECF No. 32 at 27–
18 28 (TTB expressly stating in its opening brief that it “does not ask the Court to overturn”
19 the Bankruptcy Court’s finding that Kash was a good faith purchaser under section 363).)
20 This being the case, TTB therefore does not challenge that there is sufficient evidence in
21 the record on appeal to support the Bankruptcy Court’s finding that Kash was a good faith
22 purchaser. Nonetheless, TTB assertedly contests the Bankruptcy Court making this
23 finding purportedly without first allowing TTB an opportunity for discovery to develop the
24 facts. (*Id.* at 28.)

25 As to the issue of discovery, Debtors-Appellees counter that TTB had sufficient
26 opportunity to take discovery and even if it did not, TTB could have asked the Bankruptcy
27 Court to take additional discovery. (ECF No. 43 at 28, 33–36; see also ECF No. 29 at 15
28 n.12 (providing that TTB’s ability to take discovery was not “impaired”).) The Court finds

1 the record supports that the Bankruptcy Court did not bar TTB from taking additional
2 related discovery, and TTB did not request it.

3 The finding that Kash was a good faith purchaser was made after the evidentiary
4 hearing on the Sale Motion. (See ECF No. 24-8 at 7, 14; ECF No. 33-7 at 184–290
5 (Transcript).) At that hearing, TTB’s counsel expressed a desire for more discovery in one
6 regard—to uncover what assets were being sold. (ECF No. 33-7 at 216–17.) Counsel
7 answered yes to the court’s question as to whether he wanted to conduct 30(b)(c)
8 depositions on the issue after counsel revealed TTB had not conducted such depositions
9 due to the parties’ settlement discussions. (*Id.* at 217.) In the next sentence TTB’s counsel
10 turned to the issue of determining whether Kash is a good faith purchaser. (*Id.*) At no point,
11 however, did TTB’s counsel raise the issue of taking additional discovery concerning the
12 determination of Kash’s status as a good faith purchaser. (See *generally id.* at 217–90.) It
13 is particularly notable that the issue was the chief issue at the hearing, the parties offered
14 relative evidence and TTB was allowed to present its witness to challenge a good faith
15 finding. (*Id.*) Therefore, at minimum, to the extent TTB felt it needed more discovery on
16 the good faith issue, TTB waived discovery by proceeding with the hearing and never in
17 fact requesting additional discovery on the issue. See, e.g., *In re Walldesign, Inc.*, No. CV
18 15-01844-VAP, 2017 WL 1228396, at *8 (C.D. Cal. Mar. 31, 2017) (citation omitted) (“A
19 reviewing court will only find that a lower court abused its discretion if the movant diligently
20 pursued its *previous* discovery opportunities, and if the movant can show how allowing
21 *additional* discovery would have precluded summary judgment.”) (emphasis in original).

22 Further, while the substance of the Bankruptcy Court’s good faith finding is not
23 properly before this Court, the Court additionally concludes that the Bankruptcy Court did
24 not commit clear error in making the finding. First, at the hearing, there was no real
25 challenge that Kash paid good value for the assets it purchased. (See ECF No. 33-7 at
26 201; *id.* at 193–94 (stating the work that went into getting value for unsecured creditors
27 with the support of the Committee of Unsecured Creditors); *id.* at 201 (TTB’s counsel

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1 conceding that “[t]here is no question that enormous value is being provided by Kash
2 CA”).)

3 TTB’s opposing contentions, however, chiefly focused on the relationship between
4 Debtors-Appellees and particularly Howell and the president of Kash and that the sale
5 would exclude a payout for taxes. (*E.g., id.* at 217, 221.) That Kash was a party in the
6 bankruptcy proceedings and was thereby aware of TTB’s Lien could lead to an inference
7 that Kash was a non-statutory insider of Debtors-Appellees.¹⁵ Assuming that to be the
8 case, that issue combined with the close relationship between Howell and Kash very well
9 could have weighed against a finding of good faith. But as the Committee of Unsecured
10 Creditors and Debtors-Appellees argued below (*id.* at 59, 107), even assuming Kash is an
11 insider, insider status itself does not preclude a “good faith” finding. *See, e.g., In re*
12 *Filtercorp, Inc.*, 163 F.3d at 577 (affirming good faith finding as not clearly erroneous in
13 favor of insider-buyer); *see also Old Cold, LLC*, 558 B.R. 500, 516 (B.A.P. 1st Cir. 2016)
14 (“[A] sale to an insider, without more, does not establish a lack of good faith.”). The
15 Committee of Unsecured Creditors also noted in the bankruptcy proceedings that the “pre-
16 existing business relationship and friendship . . . ha[d] been extensively disclosed by both
17 the Debtors and Kash.” (ECF No. 33-7 at 59.)

18 Furthermore, the evidence shows that Debtors-Appellees unsuccessfully pursued
19 multiple other potential purchasers aside from Kash. (*See id.* at 116–17 (declaration of
20 CRO, J. Michael Issa noting the various potential purchasers who had engaged in
21 negotiations with Debtors); *see also id.* at 82, 87–88 (Debtors-Appellees stating in gist
22 that there were protracted negotiations with prior purchasers that were never effectuated
23 for various reasons and that TTB never objected to the adequacy of the Debtors’ marketing
24 of assets and properties).) Moreover, while TTB did present a witness—Thomas Schmidt,
25 ///

26 ¹⁵Section 101(31) provides a list of those persons that are statutorily considered
27 “insiders” under the Bankruptcy Code. *See* 11 U.S.C.A. § 101(31). “A non-statutory insider
28 is a person who is not explicitly listed in § 101(31), but who has a sufficiently close
relationship with the debtor to fall within the definition.” *In re The Vill. at Lakeridge, LLC*,
814 F.3d 993, 999 (9th Cir. 2016) (citation omitted).

one of the prior potential purchasers—to undermine the good faith status of the sale to Kash, material parts of TTB's witness's testimony were determined to be inadmissible hearsay—lacking in personal knowledge. (See ECF No. 33-7 at 203, 231, 254, 256, 258, 274–75; see *also* ECF No. 33-7 at 19–22 (contending that Schmidt's declaration consisted of false statements).) On the whole then, the evidence does not support a finding that the Bankruptcy Court committed clear error in finding Kash to be a good faith purchaser.

In sum, considering the evidence and issues before the Court, the Court finds that the Appeals are statutorily moot based on section 363(m). The Court will accordingly grant Debtors-Appellees' motion to dismiss TTB's appeals of the Sale Order, the Compromise Order and Sales Procedures Order, all of which were integral to the Sale Transaction.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the appeals before the Court.

It is therefore ordered that Debtors-Appellees' motion to dismiss (ECF No. 22) is granted as set forth herein. TTB's appeals of the Compromise Order (Case No. 3:19-cv-00637-MMD), Sale Procedures Order (Case No. 3:19-cv-00666-MMD), and Sale Order (Case No. 3:19-cv-00667-MMD) are dismissed.

This order and the Court's prior order (ECF No. 76) resolve all four appeals in this consolidated case. Accordingly, the Clerk of the Court is instructed to enter judgment in accordance with these orders and close the case.

DATED THIS 3rd day of August 2020.



MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE